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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. [redacted] 12

CONCORDIA FIRE INSURANCE COMPANY,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

THOMAS J. COURTNEY,
LEON HORNSTEIN,
LOUIS H. GEIMAN,
HARRIS F. WILLIAMS,
HIRAM T. GILBERT,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 790

CONCORDIA FIRE INSURANCE COMPANY,
APPELLANT,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS.

STATEMENT BY APPELLEE AS TO THE JURISDICTION OF THE COURT.

The Facts in the Case.

In 1853 the General Assembly of Illinois passed a General Revenue Act, Section 22 of which (Laws of Illinois of 1853, p. 147) was as follows:

> "Every agency of an insurance company, incorporated by the authority of any other state or government, shall return to the assessor of the county in which the office or agency of such company may be kept, in the month of May annually, the amount of the *gross* receipts of such agency, which shall be entered on the tax list of the proper county, and subject to the same rate of taxation for all purposes that other personal property is subject at the place where located."

That act was passed fifteen years before the adoption of the Fourteenth Amendment to the United States Constitution and of course it was then a valid law. In 1869, after the adoption of the Fourteenth Amendment, the General Assembly, in its wisdom, saw fit to take that provision out of the General Revenue Act and insert it, but slightly changed, in the Fire, Marine and Inland Navigation Insurance Company Act of that year as Section 30. The only substantial change made was the reduction of the tax from one on *gross* receipts to one on *net* receipts. From 1869 down to 1921 the taxing authorities of Illinois, together with its Supreme Court, construed this Section 30 as providing for a personal property tax and requiring the net receipts to be assessed upon the same basis of valuation, that is, by equalization and division by 5, 3 or 2, as the laws from time to time provided in respect to personal property, and no one, not even the numerous insurance companies which were taxed under it, had the slightest suspicion that it operated as a denial of the equal protection of the laws. We are therefore dealing with a law the validity of which was not questioned for sixty-five years.

In 1921, however, in the case of *People* v. *Kent*, 300 Ill. 324, the Supreme Court of Illinois, without being asked to do so, of its own motion, overruled its previous decisions and held that the tax was a privilege tax which was to be extended, not upon the same debased and equalized valuation applied in the assessment of personal property, but upon the full amount of the net receipts. This led to the decision of this Court in *Hanover Fire Insurance Company* v. *Harding*, 272

U. S. 494, in which this Court reversed the judgment of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Carr*, 317 Ill. 366, and held, not as seems to be contended for by appellant, that Section 30 of the 1869 law was in violation of the Fourteenth Amendment, but that it would be so held if the tax were extended upon the full amount of net receipts instead of upon the debased and equalized value thereof. As a result of this Court's decision the Supreme Court of Illinois, in *Hanover Fire Insurance Company v. Harding*, 327 Ill. 590, overruled its previous decisions holding the tax was a privilege tax and held that the net receipts must be assessed upon the same basis of valuation as other personal property.

In this connection the attention of the Court is called to the fact that the case of *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, was a test case prosecuted by a number of insurance companies by bill in equity to enjoin the collection of the tax. One of the grounds of complaint was that the companies were taxed upon insurance receipts other than those derived from fire, marine and inland navigation insurance, whereas foreign casualty companies were not taxed on such other receipts, and hence there was an illegal discrimination against foreign fire insurance companies in favor of foreign casualty companies as well as in favor of domestic companies. In its opinion this Court held that foreign fire insurance companies, if they engaged in these other kinds of business, were taxable upon the receipts derived therefrom (272 U. S. 506). The same counsel representing the appellant in

this case represented the Hanover Fire Insurance Company in that case.

The attention of the Court is also called to the fact that Chief Justice Taft, in delivering the opinion of the Court in that case (272 U. S. 516), said:

> "Under the previous decisions of the Supreme Court of Illinois when the net receipts were treated as personal property, and the assessment thereon as a personal property tax subjected to the same reductions for equalization and debasement, it might well have been said that there was no substantial inequality as between domestic corporations and foreign corporations, in that the net receipts were personal property acquired during the year and removed by foreign companies out of the state, and could be required justly to yield a tax fairly equivalent to that which the domestic companies would have to pay on all their personal property, including their net receipts or what they were invested in."

If this was not an invitation by this Court to the Supreme Court of Illinois to make the tax valid by overruling its previous opinions and treating the tax as a personal property tax, what was it? After saying in that opinion that "it *might* well have been said," etc., could the Court, with due regard to consistency, now say "it *could not* well have been said," etc.?

It will be seen that the Court did not merely reverse the judgment of the Supreme Court of Illinois without remanding the case, as it would have done had it intended to hold Section 30 of the Act of 1869 wholly null and void, but it concluded its opinion as follows:

"The judgment of the Supreme Court of Illinois must be reversed and the case remanded *for further proceedings not inconsistent with this opinion.*"

After the decision of the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, in which the court complied with the mandate of this Court, the Board of Review of Cook County gave the insurance companies, over 200 in number, notice to appear before the Board and present their returns of net receipts in the manner specified by the Board, which was in accordance with a form prescribed by the Illinois Tax Commission and approved by the Supreme Court of Illinois in *People* v. *Barrett*, 309 Ill. 53. The insurance companies appeared by their attorneys, one of whom had appeared for the appellant in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, and who now appears for the appellant in this case. Instead of furnishing the Board of Review the information which the Board asked for and to which, under the law, the Board was entitled, the insurance companies denied the power of the Board to compel them to furnish any further information. The taxing bodies, by the aid of an expert employed for that purpose, furnished the Board with the best information obtainable, and the Board thereupon made the assessments. Being refused information, which the insurance companies could have furnished, but refused to furnish, the Board made the assessment as best it could, and that assessment, under the repeated rulings of the Supreme Court of Illinois, the insurance companies were estopped from questioning.

Upon the making of the assessments by the Board of Review, the taxes were extended and suits were brought against two hundred and eight of the insurance companies to collect them. All of the companies excepting eighteen settled their liabilities through a compromise upon a basis which they deemed satisfactory and which was slightly lower than that fixed by the Supreme Court of Illinois in the instant case. The seventeen companies contested their liability. In doing so they first took the opinion of the Supreme Court of Illinois in *People* v. *Franklin National Insurance Company,* 343 Ill. 336, upon the validity of Section 30 of the Act of 1869 by resting their case upon a demurrer to the declaration. After that case was decided against them the remaining seventeen cases were tried as one case under an agreement by which judgment was to be entered as to the liability of one company and the liability of the other companies was to abide the result.

Neither before the Board of Review nor before the court below was any evidence introduced by the companies to show what their net receipts actually were in previous years. Consequently it is impossible for the court to determine whether the assessments made were excessive, no matter what kind of receipts were required to be assessed.

In the statement presented by appellant, attention is called to the fact that the expert from whom the Board of Review received information was employed upon the basis of a contingent fee. In reply to the suggestions of counsel for the appellant it will be sufficient

to call attention to what the Supreme Court of Illinois says in its opinion in the instant case, *People* v. *Concordia Fire Insurance Company*, 350 Ill. 374-379. In the opinion of the court there was nothing in the record tending to impeach the fairness of the expert's work.

There are some inaccuracies in appellant's statement, but it is not deemed worth while to refer to them, inasmuch as they are such as can have no bearing upon the correctness of the decision appealed from. In the view of appellee the undisputed facts require a decision in favor of appellee.

Motion to Dismiss or Affirm.

The appellee now moves the Court to dismiss the appeal or to affirm the judgment of the Supreme Court of Illinois on the following grounds:

First. While, strictly speaking, the Court has jurisdiction to determine whether a law such as Section 30 of the Act of 1869 is in violation of the Fourteenth Amendment, yet when it has once decided the question it is not bound to reconsider it subsequently every time some litigant seeks to raise it. The Court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, used language clearly expressing the view that that section, if construed as it had been construed prior to the decision in *People* v. *Kent*, 300 Ill. 324, would be held valid. After so deciding and inducing the taxing authorities of the State to act upon it, it ought not to entertain jurisdiction for the purpose of making a different decision. When the question whether a law

violates the Fourteenth Amendment has been considered and decided, it will not be a basis for a subsequent appeal or writ of error.

King v. *West Virginia*, 216 U. S. 92.
Leonard v. *Vicksburg, etc., R. Co.*, 198 U. S. 416.

In this connection it is to be observed that when the Supreme Court of Illinois in *Hanover Fire Insurance Company* v. *Harding*, 327 Ill. 590, construed the opinion of this Court in *Hanover Fire Insurance Co.* v. *Harding*, 272 U. S. 494, as holding Section 30 of the Act of 1869 to be valid if the tax were extended in the same manner as property taxes generally, the insurance companies accepted the decision and allowed the taxing authorities to act upon it. One hundred and ninety out of two hundred and eight of them have accepted the decision as final and have paid their taxes. That fact, coupled with the previous acquiescence of the insurance companies for over fifty years in the enforcement of the laws justifies the Court in refusing to give it further consideration.

For this reason the appeal should be dismissed.

Second. Assuming the Court may hold the case is one for the exercise of its jurisdiction, it should affirm the judgment of the Supreme Court of Illinois for the following reasons:

1. Section 30 of the Act of 1869 was merely a re-enactment, with but slight changes, of Section 22 of the General Revenue Act of 1853 (Laws of Illinois of 1853, p. 147), which had been in force fifteen years prior to the adoption of the Fourteenth Amendment.

"It is important for this court to avoid extracting from the very general language of the Fourteenth Amendment a system of delusive exactness in order to destroy methods of taxation which were well known when that amendment was adopted and which, it is safe to say, that no one then supposed would be disturbed." *Louisville & Nashville R. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 43. Add to this fifty years of acquiescence in the law by all of the insurance companies and we have a state of facts which ought to preclude a decision at this late day overturning the statute as being in violation of the Fourteenth Amendment.

2. Before the Court can hold that the tax is unjustly discriminatory, it is not sufficient that it see that the tax imposed upon foreign companies is different from that imposed upon domestic companies, but the Court must be able to say that the tax imposed upon the former, in its practical operation, amounts to a greater burden than that imposed upon the latter.

Lindsley v. *Nat. Carbonic Gas Co.*, 220 U. S. 61.
Quong Wing v. *Kirkendall*, 223 U. S. 58.
Citizens Nat. Bank v. *Durr*, 257 U. S. 99.
Interstate Busses Corporation v. *Holyoke Ry.*, 273 U. S. 45.

This the Court would not be able to do. There is no showing as to how the taxes imposed upon the different classes of companies compare with each other. Domestic companies pay taxes in Illinois upon all their property, both tangible and intangible, including their capital stock and the good will of their business. For-

eign companies do business in Illinois without having any taxable property therein. They use capital in the State, but there is no means of knowing how much, or how it compares with the capital of domestic companies. To hold there is unjust discrimination, the Court would be compelled to hold that a difference in the method of taxation alone would amount to unjust discrimination. This cannot be done.

The insurance companies not having shown what the facts are, the Court has nothing before it from which it can determine whether the tax, in its practical operation, works unjust discrimination.

3. To hold that there was unjust discrimination as between foreign and domestic fire insurance companies the Court would be compelled to overrule a long line of its prior decisions.

In *Pacific Express Co.* v. *Seibert,* 142 U. S. 339, the Court held that a Missouri act imposing a two per cent gross receipts tax upon express companies which conveyed express matter on contracts with any railroad or steamboat company was not repugnant to the Fourteenth Amendment because it did not impose a like tax upon railroad or steamboat companies which carried express matter upon their own means of conveyance. That decision has been cited with approval in at least eighteen subsequent decisions commencing with *Giozza* v. *Tiernan,* 148 U. S. 657, and ending with *Roberts and S. Co.* v. *Emmerson,* 271 U. S. 50.

See also the following:

Western Union Telegraph Co. v. *Indiana,* 165 U. S. 304.

King v. *Mullins,* 171 U. S. 404.

American Sugar Refining Co. v. *Louisiana*, 179 U. S. 89.
Williams v. *Fears*, 179 U. S. 270.
Florida C. & R. R. Co. v. *Reynolds*, 183 U. S. 470.
Traveler's Ins. Co. v. *Connecticut*, 185 U. S. 364.
Kidd v. *Alabama*, 188 U. S. 730.
Shaffer v. *Carter*, 252 U. S. 37.

4. As to the claim that there is an unjust discrimination between foreign *fire* insurance companies and foreign *casualty* companies, but little need be said. Casualty companies were first authorized to do business in Illinois in 1899. If, prior to that time, Section 30 of the Act of 1869 was valid as between domestic fire insurance companies and foreign fire insurance companies, it could not be rendered invalid by a subsequent law allowing casualty companies to carry on business in Illinois without paying taxes on their net receipts. If any invalidity resulted it would be invalidity of the subsequent casualty company law and not Section 30 of the Act of 1869.

This point is very clearly presented in the opinion of the Supreme Court of Illinois in *People* v. *Franklin National Insurance Company*, 343 Ill. 336. We call particular attention to what the court says on pages 342 to 345, inclusive.

Apart from this no facts are alleged, much less proven, upon which the Court could find there was any injustice in discriminating between foreign *fire* insurance companies and foreign *casualty* companies. The record contains no evidence showing the amount of the taxes paid by the casualty companies as compared with the taxes paid by the fire insurance companies.

5. Another fatal objection to reversing the judgment of the Supreme Court of Illinois is the refusal of the insurance companies to make the returns which the Board of Review notified them to make. It is the settled law of the State that a property owner who, when called before the Board of Review, refuses to furnish the information requested will not be heard to complain that the assessment is excessive.

Leper v. *Pulsifer*, 37 Ill. 110.
Cummins v. *Weber*, 218 Ill. 521.
Peirce v. *Carlock*, 224 Ill. 608.

6. Finally, it is equally fatal to the right of appellant to question the correctness of the assessment that, upon the hearing in the trial court, appellant made no proof of the actual amount of its receipts and expenses. The Supreme Court of Illinois has uniformly held that a taxpayer who comes into a court of equity with a complaint that an assessment is fraudulently excessive, must show by evidence what the actual value of the property was.

Sanitary District v. *Young*, 285 Ill. 351.
Jeffery Apartment Corporation v. *Harding*, 347 Ill. 341.

If, as claimed by appellant, no receipts other than those derived from fire, marine and inland navigation insurance could lawfully be assessed, appellant is not in a position to show such receipts were assessed, and this for the reason that it cannot be told what the true amount of receipts was. This disposes of the claim that the Board of Review took 100 per cent instead of 60 per cent of the net receipts for 1927 as the assessed value, a claim which is not sustained by the evidence

in any event, as the record shows that they allowed a debasement to 75 per cent of what they estimated the receipts to be. What the assessment would have been had the insurance companies shown what their receipts actually were cannot be determined. The Court, therefore, cannot say the assessments were too high.

Appellant insisted in the courts below upon being given the standing of a complainant in a court of equity. To be given that standing it was bound to "lay its cards upon the table" and prove the actual facts and not compel the court to make a guess.

It is therefore respectfully submitted that the appeal in this case should be dismissed on the ground that the question of the constitutionality of the law was settled by this Court in *Hanover Fire Insurance Company* v. *Harding*, 272 U. S. 494, or, if the Court feels bound to assume jurisdiction, that the judgment of the Supreme Court of Illinois should be affirmed because it is so clearly right that further argument of the case would not be justified.

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Received a copy of the foregoing statement this 14 day of February, 1933.

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